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IN THE

Supreme Court of the United States

OCTOBER 1986 TERM

STACEY LYNN MERKT and
JOHN B. ELDER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES PRESENTED

I

HAS THE STRICT SCRUTINY STANDARD REQUIRING AN INDEPENDENT COURT DETERMINATION THAT THE GOVERNMENT HAS A COMPELLING STATE INTEREST TO INTRUDE ON RELIGIOUS BEHAVIOR BEFORE CRIMINAL SANCTIONS CAN BE IMPOSED, BEEN ABANDONED AND BEEN REPLACED WITH UNIFORM DEFERENCE TO ANY ACT OF CONGRESS, SUBJECTING IT TO NO SCRUTINY, NOT EVEN THE LAX RATIONAL BASIS TEST?

II

CAN A PERSON BE CONVICTED OF CONSPIRACY WHEN SHE DID NO ACT TO FURTHER THE ALLEGED CRIMINAL CONSPIRACY AND MERELY ASSOCIATED WITH THE ACTORS AS PART OF A RELIGIOUS COMMUNITY?

III

WILL DUE PROCESS ALLOW POLICE TO OFFER AN IN-CUSTODY WITNESS A LIFE AND DEATH INCENTIVE TO IDENTIFY WHO THEY WANT IDENTIFIED?

IV

WHEN POLICE HAVE GIVEN A LIFE AND DEATH INCENTIVE TO AN INCARCERATED WITNESS TO MAKE THE IDENTIFICATION THE POLICE WANT, CAN A "DISASTEROUSLY SUGGESTIVE" PHOTO DISPLAY WHICH FOLLOWS ON THE HEELS OF THAT INCENTIVE SURVIVE CONSTITUTIONAL MUSTER?

B

ALL PARTIES ARE LISTED IN THE CASE CAPTION.

TABLE OF CONTENTS

	Page
Statement of Issues Presented	i
Listing of Parties	i
Table of Contents	ii
Table of Authorities	iii,iv
Opinion Below	v
Jurisdictional Statement	v
Statement of the Case	vi
Constitutional Provisions Involved	vi,vii
Argument	
I. The Strict Scrutiny Standard Requiring An Independent Court Determination That The Government Has A Compelling State Interest To Intrude On Religious Behavior Before Criminal Sanctions Can Be Imposed, Cannot Be Abandoned And Be Replaced With Uniform Deference To Any Act of Congress, Subjecting It To No Scrutiny, Not Even The Lax Rational Basis Test.	1
II. A Person Cannot Be Convicted Of Conspiracy When She Did No Act To Further The Alleged Criminal Conspiracy And Merely Associated With The Actors As Part Of A Religious Community.	14
III. Due Process Does Not Allow Law Enforcement Officers To Offer An In-Custody Witness A Life And Death Incentive To Identify Who The Officers Want Identified.	18
IV. When Police Have Given A Life And Death Incentive To An Incarcerated Witness To Make The Identification The Police Want, A "Disasterously Suggestive" Photo Display Which Follows On The Heels Of That Incentive Cannot Survive Constitutional Muster.	24
Conclusion	32

TABLE OF AUTHORITIES

Supreme Court Cases

	Page
Bowen v Roy, 106 S.Ct. 2147 (1986). . . .	8,9
Jackson v Deno, 378 U.S. 368 (1964) . . .	20
Lego v Twomey, 404 U.S. 477 (1972). . . .	20
Manson v Brathwaite, 432 U.S. 98 (1977)	29
Mincy v Arizona, 437 U.S. 385 (1978). . .	20
Noto v United States, 367 U.S. 290 (1957).	16
Plyler v Doe, 457 U.S. 202 (1982)	9,10
Scales v United States, 367 U.S. 203 (1961).	16
Sherbert v Vernor, 374 U.S. 398 (1963). .	5,7
Thomas v Review Board of Indiana, 450 U.S. 707 (1981).	6
Wisconsin v Yoder, 406 U.S. 205 (1972). .	6,7,9
Yates v United States, 354 U.S. 298 (1957).	16

Page

Fifth Circuit Cases

Gumsby v Wainwright,
596 F.2d 654 (5 Cir 1979). 21

Leary v United States,
383 F.2d 851 (5 Cir 1967). 7

United States v Cueto,
611 F.2d 1056 (5 Cir 1980) 29

Other Federal Cases

LaFrance v Bohlinger,
499 F.2d 29 (1 Cir 1974) 20

Peyote Way Church of God v Smith,
742 F.2d 193 (9 Cir 1984). 7

United States v Spock,
416 F.2d 165 (1 Cir 1969). 16

Other Cases

People v Woody,
394 P.2d 813 (Cal 1964). 8

Statutes

8 U.S.C. §1324 10

OPINION BELOW

The ruling of the Fifth Circuit is in the Appendix. It is File No. 85-2264. The ruling of Justice Hayden Head on the religion issue is in the Appendix and is reported at 601 F. Supp. 1574 (S.D. Tex 1985). The other relevant rulings of the Trial Court are in the Appendix.

JURISDICTIONAL STATEMENT

1. The opinion being appealed was filed on July 17, 1986.

2. The Petition for Rehearing was filed August 14, 1986 and denied September 4, 1986. The Motion to Withdraw the Mandate and Comply with Fifth Circuit Rules was denied October 7th, 1986.

3. The Honorable Justice Byron White, pursuant to Rule 43, signed an Order on October 28, 1986 enlarging the time to file this Petition for Certiorari until December 3, 1986.

4. Jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

This case arises out of the conviction of John B. Elder of five counts of violating 8 U.S.C. §1324 or conspiracy to violate 8 U.S.C. §1324 and the conviction of Stacey Lynn Merkt of one count of conspiracy to violate 8 U.S.C. §1324(a)(2). Ms. Merkt was acquitted of the substantive charges.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARGUMENT

I

THE STRICT SCRUTINY STANDARD REQUIRING AN INDEPENDENT COURT DETERMINATION THAT THE GOVERNMENT HAS A COMPELLING STATE INTEREST TO INTRUDE ON RELIGIOUS BEHAVIOR BEFORE CRIMINAL SANCTIONS CAN BE IMPOSED, CANNOT BE ABANDONED AND BE REPLACED WITH UNIFORM DEFERENCE TO ANY ACT OF CONGRESS, SUBJECTING IT TO NO SCRUTINY, NOT EVEN THE LAX RATIONAL BASIS TEST.

Faced with a case where religious behavior was criminalized, the Fifth Circuit not only refused to apply the "strict scrutiny" balancing test, but, held no balancing test at all need be applied. This ruling came in a case of great importance to religious communities throughout the country; the John B. Elder and Stacey Lynn Merkt case.

John B. Elder, a catholic, and Stacey Lynn Merkt, a protestant, are religious people who live their lives with a deep adherence to the requirements of their faith. Mr. Elder and his wife, upon becoming familiar with the horrors faced by refugees fleeing Central American wars, answered the call of their church, and with

their four pre-teen children, moved from San Antonio to San Benito, Texas to run the Casa Oscar Romero, a church-sponsored shelter for Central Americans. Stacey Lynn Merkt was selected as a volunteer to help run the shelter.

While working for the Casa Romero, criminal charges were brought against Mr. Elder and Ms. Merkt.

During pre-trial hearings on defense motions to dismiss, numerous religious leaders testified, explaining the non-avoidable duty to assist refugees. The testimony pointed out that central to most religious belief is respect for the sanctity and dignity of human life and the obligation to assist others in danger. The historical basis of churches and practitioners providing refuge or sanctuary is found in nearly every religion and dates back thousands of years.[1]

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[1] The Old Testament commands assistance of refugees.

"Hide those who have been driven out, do not let the refugee be seen. Let those who have been driven out of Moab stay with you; be their refuge against the destroyer." Isaiah 16:3-4.

"When a stranger sojourns with you in your land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love that person as yourself: for you were strangers in the land of Egypt; I am the Lord your God." Leviticus 19:33-34.

The New Testament also commands assistance of refugees.

"When the Son of Man comes in his glory and all the angels with him, he will sit in state on his throne, with all the nations gathered before him. He will separate men into two groups, as a shepherd separates the sheep from the goats, and he will place the sheep on his right hand and the goats on his left. Then the King will say to those on his right hand, 'You have my Father's blessing; come, enter and possess the kingdom that has been ready for you since the world was made. For when I was hungry, you gave me food; when thirsty, you gave me drink; when I was a stranger, you took me into your home; when naked, you clothed me; when I was ill, you came to my help; when in prison, you visited me.'" Mathew 25:31-41.

Many national church organizations had representatives testify and the statements of support from the governing bodies of many more were admitted into evidence.[2]

After several days of hearings, the Honorable Judge Hayden Head ruled:

> "the Court simply finds that Elder fulfilled his christian obligations as he genuinely perceived

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[2] Many major national churches have spoken out in favor of the religious precepts at issue here. Since 1980, hundreds of priests, ministers, nuns and missionaries have been brutally tortured, raped and murdered in El Salvador solely because of their religious work. Over 50,000 citizens have been the victims of vicious murders. The assassination of Archbishop Oscar Romero, while giving mass at the National Cathedral, and the slaying of the mourners at his funeral, was but one example of violence testified about. Days of testimony and thousands of pages of depositions submitted in the lower Court revealed that the constant atrocities have already horribly killed one in every 70 Salvadoran civilians while displacing more than 1/3 of the population. Testimony from clergy of numerous denominations set out the religious mandate of saving human lives when all that is required is to non-violently provide a place to stay, a ride, a meal, a shelter. Contrary to the opinion's statements, this is religious behavior which cannot be shirked or satisfied in other ways.

them to be and Elder presented substantial testimony to support his view of christianity."[3]

The Court's ruling that Mr. Elder and Ms. Merkt were acting upon their genuinely held religious beliefs triggers the constitutional guarantee of free exercise of religion. Because of the constitutional limitation prohibiting the government from interfering in the free exercise of religion, this Court held in Sherbert v Vernor, 374 U.S. 398 (1963), that "it is basic that no showing merely of a rational relationship to some colorable state interest would suffice" to justify governmental restrictions of religious behavior. The government's enforcement efforts must survive the Court's independent "strict scrutiny" examination. This requires the government to:

1. Show a compelling state interest for the application of the

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[3] Judge Vela adopted Judge Head's Findings and made the same Finding regarding Stacey Lynn Merkt.

statute;

2. Show an exception cannot be made for religiously motivated behavior; and

3. Demonstrate that the least restrictive means is used in accomplishing its goal.

This test has been consistently reiterated; Wisconsin v Yoder, 406 U.S. 205, 215 (1972); Thomas v Review Board of Indiana, 450 U.S. 707 (1981).

Despite this precedent, a panel of the Fifth Circuit in a stunning departure from this well-worn balancing test, held that it need not apply the "strict scrutiny" standard in examining the government's ability to criminalize religious behavior. In deserting the "strict scrutiny" test, the panel did not even substitute the rational basis test, but instead, abdicated all judicial review of enforcement of a criminal statute which criminalized religious conduct. The panel's holding was:

> "there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of Merkt and Elder to their conviction fails."

The panel thus created a rule that constitutional protections are per se inferior to statutory enactments. This would change the law to be that courts would not examine competing interests between the government and the person whose religious behavior has been criminalized, but instead, would uniformly defer to congress. This Court has instructed that the exact opposite is true. Courts have the obligation to assure that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Yoder at 215.

The decision justifies ignoring the authority of this court as laid out in Sherbert, and its progeny by citing pre-Sherbert case and misconstruing cases where the fact-finding court had found no religious basis to the petitioner's claim of religiously protected behavior. Such cases are off point here where a religious base was found. Compare the court's use of Leary v United States, 383 F.2d 851 (5 Cir 1967) with Peyote Way Church of God v Smith, 742 F.2d 193

(9 Cir 1984) and People v Woody, 394 P.2d 813 (Cal 1964). Here, the fact-finding court determined that Mr. Elder and Ms. Merkt's actions were religiously motivated; thus, those cases are inappropriately relied on.

More disturbingly, the decision cites Bowen v Roy, 106 S.Ct. 2147 (1986) as authorizing a lowering of the standard of scrutiny of governmental intrusion into religious behavior. Although Bowen had splintered opinions, none of them authorized lowering the "strict scrutiny" standard in criminal cases. Chief Justice Burger's opinion took great pains to emphasize that the standard of review be lower only in non criminal cases:

> "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity ..."

The other opinions would not have lowered the standard in any cases, but here, we have the Fifth Circuit using Bowen as justification for

eliminating constitutional scrutiny altogether. Because Bowen contained a wide divergence of opinions, it is imperative that this distortion of Bowen be quickly weeded out.

The Fifth Circuit panel opinion also claims that because the criminal statute is related to immigration matters, it is not reviewable by the courts as immigration matters are somehow exempt from constitutional review. A similar claim was made before this court in Plyler v Doe, 457 U.S. 202 (1982). However, while the Court recognized that the government has an interest in stemming the flow of illegal entrants and the economic hardship their residence may produce, this Court found that children's access to education is more compelling an interest than generalized border control interest. This is particularly instructive when it is compared with Yoder where free exercise of religion was found more important than education.

After pronouncing that it need not do so, the panel stated that "[I]n an abundance of analytical caution," it would review the Yoder

test as it applied to the case then failed to do so. Rather than "strictly scrutinizing" what specific government interests are involved; whether exceptions to them would defeat the purpose of the statute; and, whether the least restrictive means are utilized to achieve them; the opinion discusses broad generalized goals in precisely the terms rejected in Plyler, and asserts that it must defer to congress on these issues.[4] Thus the panel failed to join the issue and never discussed any specific harm caused by the petitioner's actions. At the trial level, the INS district director testified that an exception to §1324 for religious reasons would not present any enforcement problem.

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[4] The intent of congress to criminalize helping refugees as opposed to commercial coyotes is questionable in light of the fact that it passed the 1980 Refugee Act; twice has passed a sense of the congress resolutions recommending INS grant extended voluntary departure to Salvadorans allowing them to stay here until hostilities cease; recently reduced 8 U.S.C.§1324 to a misdemeanor if not for pay; and over 100 congress persons sent a letter on behalf of Mr. Elder and Ms. Merkt at their sentencing.

When the lower Court has found that the government's action is criminalizing and punishing constitutionally protected religious activities,[5] such an analysis does not satisfy the Court's constitutional obligation to specifically examine the statutes as applied to the circumstances before it.

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[5] The decision quarrels with whether the defendants' religious beliefs really require them to assist refugees and makes suggestion as to how they might fulfill a religious obligation to help those whose lives are in danger. It is not up to the Court to pass judgment on whether ones religious beliefs match the Court's perceptions of what makes sense, but only to pass on whether they are truly held. However, the Fifth Circuit panel's suggestion that collecting money or sending missionaries to El Salvador or preparing legal forms would be a better way to fulfill religious obligations, reflect a total lack of perception of the religious issues and the human realities involved. All three of those activities are done at a cost of millions of church dollars and the lives of numerous clergy. But for a Salvadoran whose name is on a death list, no amount of indirect help from the church will save that life. At the time of this trial, no Salvadoran had ever been granted asylum in the Harlingen district of Texas. It is fanciful to believe that the INS is willing to follow the law and properly redress this problem by following the 1980 Refugee Act.

Mr. Elder stands convicted of giving three children and two adults who had just crossed the border a ride of about twelve miles to a church-run and sponsored shelter where they could find food and shelter. They seldom saw him again. Ms. Merkt, who was not within a thousand miles of Casa Romero at the pertinent time periods, stands convicted of conspiracy to transport the three children and two adults to a bus station, presumably because her car may have been used to give the refugees a ride to the bus station.

Everyday, about 10,000 undocumented people cross our southern border. The number that are given help by churches, thereby alleviating the burden on everyone else, is minuscule.

What the opinion fails to come to grips with, and thus, this Court must grapple with is, what is the specific compelling state interest that requires making the religious non-selfish act of providing a ride of a few miles to those fleeing death, a felony.

This is an important case being carefully

watched by millions of hardworking, law-abiding church people throughout the country and the world. They are confused by the Fifth Circuit's claim that there is no need to scrutinize government's infringement of religious behavior. The panel's statement that "claims of conscience must yield to the twin imperatives of even-handed enforcement of criminal laws and preservation of our national identity as defined by the immigration laws" forgets that in the United States, which began as a sanctuary for people fleeing religious persecution, one of the imperatives of our society is that people can determine their own religious behavior and government can only intrude upon it when it can show the Court it has a strong reason that requires the government to prohibit and punish the religiously required behavior.

II

A PERSON CANNOT BE CONVICTED OF CONSPIRACY WHEN SHE DID NO ACT TO FURTHER THE ALLEGED CRIMINAL CONSPIRACY AND MERELY ASSOCIATED WITH THE ACTORS AS PART OF A RELIGIOUS COMMUNITY.

Although originally charged with two substantive counts of transporting illegal aliens and one count of conspiracy to transport, Ms. Merkt was acquitted of all substantive counts. The only conviction against her was one count of conspiracy to transport. The basis of the acquittal was that Ms. Merkt, for over a week before and for several days after the date the refugees were transported and arrested, was in the State of New York; thus, she was in no way involved in their transportation. The refugees' testimony was that the woman who transported them had first spoken to them about that transportation two or three days before they were transported. This happened when the refugee requested a ride to the bus station. Prior to this, no discussion of leaving the shelter had taken place or been contemplated.

Therefore, in that Ms. Merkt was a thousand miles away at the time of this conversation, it could not form the basis of the conspiracy charge against her. Thus, the grounds for Ms. Merkt's conspiracy conviction was the fact that she worked at the religious shelter, the Casa Oscar Romero.[6] The only other evidence regarding Ms. Merkt was that her car, which was kept at the Casa Oscar Romero, may have been used as the automobile that transported the refugees to the bus station. This fact gives serious concerns regarding the appropriateness of a conviction, particularly in light of not only First Amendment religious rights, but also First

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[6] The jury had been acquainted with the fact that she had a prior conviction for transporting which was subsequently reversed by the Fifth Circuit and the case was dismissed at the trial level by the United States attorney. This prior record was brought to the jury's attention during cross-examination of an alibi witness without prior approval from the Court when the Court had specifically required that the prior record could not be gone into without prior Court approval.

Amendment freedom of association rights as is discussed in the companion cases of Scales v United States, 367 U.S. 203 (1961) and Noto v United States, 367 U.S. 290 (1961), and further explored in Yates v United States, 354 U.S. 298 (1957), as well as United States v Spock, 416 F.2d 165 (1 Cir 1969).

Even beyond the failure of the Fifth Circuit to adequately address the freedom of religion issues discussed in the previous argument, a far deeper intrusion into religious expression and association arises uniquely from Ms. Merkt's facts. And that is,: can a person be convicted of a conspiracy to transport an illegal alien based solely upon the fact that she is a known associate and co-religious participant in lawful behavior of a church-operated shelter? We suggest the answer to that question is certainly not. It is essential that the Supreme Court accept certiorari in this case to clarify the troubling broad sweep that this landmark case presently stands for in terms of the right to criminally punish religious behavior even when

that behavior is nothing more than association in lawful activities of a recognized church body when that recognized church body becomes identified with behavior displeasing to the INS.

III

DUE PROCESS DOES NOT ALLOW LAW ENFORCEMENT OFFICERS TO OFFER AN IN-CUSTODY WITNESS A LIFE AND DEATH INCENTIVE TO IDENTIFY WHO THE OFFICERS WANT IDENTIFIED.

From the outset, this case was handled very differently than criminal cases normally are handled. The testimony was uniform that typically refugees found on buses are not taken to the anti-smuggling unit for the purposes of interrogation as to who it is who may have transported them. What triggered the difference here was the mention by one of the refugees that sometime when they were in Mexico, they had stayed at a church. For sometime, the INS had been bothered by the negative publicity that they had been receiving from Stacey Lynn Merkt and John B. Elder in the various different talks they were giving at churches and other institutions in the Rio Grande Valley, discussing the plight of refugees who they had met coming from Central America. The litany of unusual conduct in the handling of this case echoed through the testimony of each and every

INS officer who testified. But it culminated in an outrageous procedure. The male refugee, separated from the female refugee, was taken into a room with two agents; he was told that if he "gave them answers they liked, they would let (him) and the children go to Washington". If he did not tell them what they wanted to hear, he would be deported back to El Salvador. The refugee had fled El Salvador in fear of not only his own life, but the lives of the three children accompanying him and his female companion. He testified that to him this was the difference between being allowed to live in the United States or being sent back to El Salvador to his death. It is particularly curious that the promise was not, if he told the truth, he would get to go to Washington, D.C. or if he told them what happened, he would get to go to Washington, D.C., but rather, if he gave them what they wanted to hear, he would get to go to Washington, D.C. Prior to this point in time, the INS agent testified that they were well aware of Stacey Lynn Merkt and John B.

Elder. They had accumulated video tapes of their appearances on television, newspaper clippings of their statements in the press; they were quite unhappy with these two individuals. In their minds, they were convinced that anybody connected with the church assisting refugees would probably be Ms. Merkt and Mr. Elder.

Refugees fleeing El Salvador are familiar with brutal police officials who severely punish noncooperation. The refugee, in this case, witnessed the killing of people by the government merely for not having the appropriate papers in their pocket. The cost of not substantiating police suspicions, be they true or false, is severe and immediate, the reward equally clear. Playing on these well known fears is repugnant to American concepts of justice.

Lego v Twomey, 404 U.S. 477 (1972), LaFrance v Bohlinger, 499 F2d 29 (1 Cir 1974), Jackson v Deno, 378 U.S. 368 (1964) and Mincy v Arizona, 437 U.S. 385 (1978) make clear that coerced testimony is not admissible. Testimony

that is the product of any sort of threat or violence or direct or implied promise is simply not admissible: Gumsby v Wainwright, 596 F.2d 654 (5 Cir 1979). Here, we have the ultimate bribe, a promise of life for compliance, as opposed to possible death for non-compliance to a man who had already fled El Salvador.

The only witness called by the prosecution who ever identified either Ms. Merkt or Mr. Elder was this coerced witness. The other refugee witness who was not subject to the same promises never identified either Mr. Elder or Ms. Merkt. This outrageous tactic standing in and of itself is sufficient to require the suppression of the witness' testimony as fundamentally unreliable and the product of gross government misconduct.

The effect of the coercion of the witness carried right through to the day of trial. The refugee witness stood up prior to giving his testimony, the jury was excused from the room and he demanded that the promises made to him by the government be carried out before he would

testify; thus, dramatically revealing his view that saying what the government wanted was his ticket to remain in the United States.

The children he was so concerned about were held in government custody until just after the trial when they were released and went to Washington, D.C. Today, Mr. Mendez-Valle lives in the Washington area, as does his female traveling companion (who is believed to now possess a green card), and the three children who were with him.

What makes this bribe particularly disturbing is the manner in which it exploits the refugee's terror to get him to say whatever the government would have him say. It is devoid of any indicator of reliability. A refugee under these situations will be far more likely to give false identification than an accurate one, particularly if he has been helped by a coyote or by some other person who might be in a position to help other members of his family escape the treacheries that have already claimed the lives of over 50,000 of his fellow

countrymen. For an American law enforcement official to use this technique, and thereby inject into the system unnecessary creators of unreliable testimony and evidence, is inexcusable. No legitimate purpose is served by allowing government officials to offer frightened people who come from a country where, when you are picked up by the police, you may be tortured, you may disappear, you may be subjected to tremendous humiliation; and with that firmly in their minds, offer them the opportunity to live.

IV

WHEN POLICE HAVE GIVEN A LIFE AND DEATH INCENTIVE TO AN INCARCERATED WITNESS TO MAKE THE IDENTIFICATION THE POLICE WANT, A "DISASTEROUSLY SUGGESTIVE" PHOTO DISPLAY WHICH FOLLOWS ON THE HEELS OF THAT INCENTIVE CANNOT SURVIVE CONSTITUTIONAL MUSTER.

A. The Suggestive Procedures

The actions of the government created unreliable evidence by needlessly stripping the whole process of all indicia of reliability. As discussed in III, from the outset, INS agents poisoned the process by giving the refugee witness an incredible incentive to fabricate. The agents told the refugee that if he "gave them answers they liked they would let (him) and the children go to Washington." Otherwise, the refugees would be deported to what he testified to be death in El Salvador.

After creating this powerful motivation to fabricate, the INS agents made certain that the male refugee knew who he was supposed to pick.

The agents had been told that an anglo blonde woman assisted the refugees; they set out to assure that Stacey Lynn Merkt would be

identified as that person.

Incredibly, the agents took a color photo display of seven hispanic women and, with the refugee witness seated between them, discussed adding Stacey Lynn Merkt's picture. One of the agents left the room, returned with a black and white photo of Ms. Merkt, and while the witness sat there next to him, put Ms. Merkt's picture at the end of the display of hispanic women. This naturally made Ms. Merkt the only white woman and the only light haired woman in the display. More importantly, it made her the only woman who was specifically discussed and added to the display right before the witness's eyes.

The photo display of Mr. Elder was likewise constructed right in front of the witness after the agents discussed adding his picture. Mr. Elder was displayed with other white males, but was the only one with a mustache and glasses.

Thus, the government created a powerful reason for the witness to fabricate and then made it crystal clear who they wanted identified. This case stepped beyond suggestive procedures,

which indicate who the agents believe is responsible for the crime; it also created an incentive or bribe (here, life itself) to assure the witness followed the suggestion. This government-created combination was so corrosive to the witness's reliability as to render it non-existent.

B. Reliability

No other evidence supported the male refugee's identification. In fact, it was directly proven to be false. The female refugee did not identify either Mr. Elder or Ms. Merkt. This is particularly revealing in that she was not present, as the male refugee was, when the agents constructed the display, and thus, had not heard who it was she was supposed to identify. Likewise, she had not been present when promises regarding staying in the country were made.

The bus station ticket sales person testified that she remembered well who bought the refugees bus tickets and indeed a blonde anglo had bought the bus tickets for the

refugees, but the purchaser was not Ms. Merkt, but rather was approximately 50 years old and taught at Pan American University.

Most importantly, it was shown that at the time the male refugee claimed Ms. Merkt had bought his ticket and then driven him to the bus station, Ms. Merkt was not within 1,500 miles of South Texas. The refugee claimed that the first time he talked to the woman who helped him about helping him was two or three days before his arrest. He claimed, on the day of his arrest, that he was driven to the bus station by Ms. Merkt. This was her supposed involvement in the case, and it was shown to be untrue. Almost a dozen witnesses established that for more than a week before and several days after the refugee's arrest, Ms. Merkt was not even in the State of Texas. Representatives of the airlines confirmed that tickets had been bought and used going to and returning from New York in her name, placing her in New York City during this time period. Pictures and witnesses established that she was in fact in New York attending a

wedding and then a Thanksgiving celebration during this time period. Her probation officer confirmed she had received permission to go to New York prior to her trip and checked in upon her return. She had left Texas long before the refugee claimed he first approached her about helping him get to the bus station. The jury clearly accepted this as true in that they acquitted Ms. Merkt of the charges of transporting the refugees to the bus station. Thus, we can see, not only did the procedures create a substantial likelihood of misidentification, but they in fact, did result in a false identification.

C. The Fifth Circuit Panel Decision

In examining the constitutionality of admitting this identification evidence, the Fifth Circuit panel decision ignores the impact on reliability of an identification procedure which is preceded by a life or death bribe for giving "the answer they liked." In such a situation, the only way the identification can survive constitutional challenge is if indicia

of reliability exist which are not the direct product of the corrupting process. Here such was not the case. The "disasterously" suggestive procedures blatantly indicated who the compromised witness should pick.

In its analysis of the five factor test set out in Manson v Brathwaite, 432 U.S. 98 (1977), the decision impermissibly uses the tainted identification to substantiate itself. The opinion does not look for substantiation or indicia of reliability from outside the witness's own rebuffed claims. The decision's discussion is based primarily on the discredited claim that Ms. Merkt was in Texas on November 21, 1984 which the evidence established was not true.

Manson v Brathwaite, supra and United States v Cueto, 611 F.2d 1056 (5 Cir 1980) explains that one must look to the totality of the circumstances to determine if an identification procedure led to a substantial likelihood of misidentification. Here, all indicators, other than the doubly tainted

identification itself, show it to be unreliable.

Thus, the Fifth Circuit's decision carves out a new rule of admissibility that holds that even if the identification procedures are impermissibly suggestive, and even if there are no independent indicators of reliability, and even where substantial incentive is given to make an identification consistent with the agent's theory of who should be identified, it is still admissible. Such a rule encourages law enforcement agents to destroy reliability and grievously damages the truth finding process by tightly leading the witness to the desired result.

If a non-suggestive line-up had been used after the improper incentives to lie had been implanted, the line-up procedures themselves might have provided indicators of reliability. But instead, the agents conducted a "disasterously suggestive" photo display, destroying any way to know whether the identification was the product of honest memory or induced by the bribe.

It is just this sort of evidence tampering that the rules of evidence and exclusionary rules are designed to prohibit. There was no reason consistent with finding the truth to use such a procedure. The only reason for such a procedure was to make sure two pre-selected people were identified, whether correctly or not.

The due process clause, the confrontation clause, as well as other constitutional concepts exist to prevent this sort of abuse. The Fifth Circuit's opinion cannot stand consistent with even the most subdued concepts of due process. If it is allowed to stand, it will tarnish the investigative process and needlessly lead to a pronounced reduction in the trustworthiness of the trial process.

CONCLUSION

The case before the Court raises several disturbing issues for your review. First, the Fifth Circuit's dramatic abandonment of the "strict scrutiny" balancing test when government seeks to intrude upon and criminalize religious behavior, requires the attention of this Court. The decision of the Fifth Circuit totally restructures the relationship between governmental power and religious freedom. Such a dramatic shift in a constitutional law cannot appropriately be wrought by a Federal Circuit Court but must be reviewed and considered by this Court. The change the Fifth Circuit has embraced is counter-productive to the very foundation of our nation's adherence to governmental restraint in areas of religious belief and constitutional limitations on the power of government to intrude in these areas.

The case also gives rise to the need to assure that the concepts of due process and fair trial are not swept aside in cases where people, who are perhaps viewed as unpopular in the eyes

of some, are tried in a slipshod manner using government-created unreliable evidence which was shown to not only be unreliable, but in fact, false. The use of corrupting inducements and "disasterously" suggestive identification techniques, stripped of all indices of reliability, cannot be sanctioned by our courts.

In a case that is being watched by so many good solid citizens, it is important that the message is not sent that in an American Court, convictions can be obtained in such a manner.

Respectfully submitted,

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